

The amount of dwelling rental income an HA expects to receive is an important element in estimating subsidy eligibility. If rental income increases, operating subsidy eligibility will generally decrease. Likewise, if rental income decreases, an HA may receive a greater amount of subsidy. With some exceptions, HUD expects that HAs will project an occupancy level of 97 percent. This standard of 97% has been part of the PFS since its implementation in 1975.

That part of the PFS that deals with the projection of occupancy levels is known as the vacancy rule. The vacancy rule was published as a final rule in 1986 (51 FR 16835, May 7, 1986) and was intended to create incentives to HAs to return vacant units to occupancy and to maintain an occupancy level of 97% or higher. The rule provided these incentives by: defining the conditions under which HUD would approve the use of an occupancy level of less than 97%; specifying that an HA need not use an occupancy level higher than 97%; and, in recognition that a low number of vacancies may make it difficult for a small HA to reach 97%, allowing small HAs to use an occupancy percentage based on having 5 or fewer vacant units.

In September 1991, HUD published a proposed rule (56 FR 45814, September 6, 1991) that would have made significant changes to the way in which vacant units would be considered eligible for operating subsidy. These proposed changes would have included:

1. Increasing the occupancy standard from 97% to 98%;
2. Eliminating HUD-approved Comprehensive Occupancy Plans (COPs) as a means to justify using less than the prescribed occupancy standard;
3. Limiting the amount of subsidy paid for those vacant units that are greater than 2% of the total number of units available for occupancy; and
4. Instituting a year-end review to compare the HA's actual occupancy achieved with its projected occupancy percentage.

Before the comment period on the proposed rule expired, Congress inserted language in HUD's Appropriation Act for 1992 (105 Stat. 757) that prohibited HUD from using appropriated funds to implement the proposed rule. Later, Congress included a provision in the Housing and Community Development Act of 1992 (section 114(b), Pub. L. 102-550; 42 U.S.C. 1437g(a)(3)(A)) that required that any changes to the PFS relating to the payment of operating subsidies to vacant public housing units be

accomplished only through the use of negotiated rulemaking procedures.

Regulatory Negotiations

In July 1994, HUD entered into an Interagency Agreement with the Federal Mediation and Conciliation Service (FMCS) for convening services that would assist HUD in assessing the feasibility of assembling a balanced committee willing and able to work towards the goal of consensus on a proposed vacancy rule that was within HUD's statutory authority and addressed the issues of the interested parties. If HUD proceeded with the formation of a negotiated rulemaking committee, the Interagency Agreement called for the FMCS to provide facilitating services.

The final convening report was provided to HUD in September 1994 and concluded that "there is sufficient support to re-examine the vacancy rule through a regulatory negotiations process." A copy of the report titled *Convening Report for Regulatory—Negotiations on HUD's Vacancy Rule* is in the office of the Rules Docket Clerk.

Chartering of Reg-Neg Committee

As a general rule, a Federal Department is required to comply with the requirements of the Federal Advisory Committee Act (FACA), Pub. L. 92-463, 5 U.S.C. App., when it establishes or uses a group of non-Federal members as a source of advice. Under FACA, HUD was required to request a charter for this reg-neg committee. Approval of the charter submitted by HUD to the Office of Management and Budget was given on February 23, 1995.

Substantive Issues for Negotiation

The convening report identified the following issues to be addressed by the Committee:

- What constitutes an acceptable level of vacancies for housing authorities of various size classifications?
- What criteria should be used for providing less than full subsidy?
- What criteria should be used for providing full subsidy despite less than full occupancy?

Committee Membership

The FMCS conveners consulted and interviewed over 30 officials of various organizations interested in and affected by the vacancy rule. Three national HA associations—the Council of Large Public Housing Authorities (CLPHA), the National Association of Housing and Redevelopment Officials (NAHRO), and the Public Housing Authority Directors

Association (PHADA)—worked together to suggest executive directors of HAs for committee membership that would reflect a balance among HAs in terms of size and number of vacant units. The national associations committed themselves to serving as staff support to the HAs selected for membership.

The members of the Committee were:

- Housing Agencies

Housing Authority of the City Of Houston (TX)
Cuyahoga Metropolitan Housing Authority (Cleveland, OH)
Housing Authority of the Birmingham District (AL)
New York City Housing Authority (NY)
Housing Authority of the City of Newark (NJ)
Housing Authority of the City of Reno (NV)
Housing Authority of the City of Littleton (CO)
Housing Authority of the City of South Bend (IN)

- Tenant Organizations and Public Interest Groups

Bromley Heath Tenant Management Corporation, Jamaica Plain, MA
New Jersey Association of Public and Subsidized Housing Residents, Inc.
Housing and Development Law Institute, Washington, DC
Illinois Association of Housing Authorities

- Federal Government

U.S. Department of Housing and Urban Development

Development of Proposed Rule

The first meeting of the Committee took place March 7-9, 1995, in Washington, DC. The FMCS conveners also served as facilitators for the Committee. Committee members agreed to a set of protocols that covered the areas of participation, decisionmaking, meetings, the role of the FMCS facilitators, and the intended product of the negotiations. The Committee agreed to define consensus as unanimous agreement to advance a specific proposal as the Committee's recommendation on any given point. As framed by one member, the goal of the negotiation should be a proposed rule that makes sense to all committee members or, alternatively, no proposed rule at all.

The Committee members then began a discussion among themselves over possible issues that needed to be addressed. The FMCS facilitators used a variety of techniques, including brainstorming, supposition, and suggestion, to have the group focus on what the general objective or objectives should be for a new vacancy rule and